# IN THE MISSOURI COURT OF APPEALS
# FOR THE WESTERN DISTRICT

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| CHERYL THRUSTON, et al., | ) | Cole County Circuit Court |
| | ) | |
| Plaintiffs/Appellants, | ) | Hon. Thomas J. Brown, III |
| | ) | |
| vs. | ) | Circuit No. 19 |
| | ) | |
| JEFFERSON CITY SCHOOL DISTRICT, | ) | Division II |
| | ) | |
| | ) | WD Appellate No. 60172 |
| Defendant. | ) | |
| | ) | Circuit Case No. 00CV-323483 |

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## BRIEF OF APPELLANT

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Respectfully submitted by: BARTLEY, GOFFSTEIN, BOLLATO
AND LANGE, L.L.C.


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## JURISDICTIONAL STATEMENT

Appellants filed their Petition seeking declaratory relief against Respondent Jefferson City School District contending that the School District violated their rights under the First and Fourteenth Amendments of the United States Constitution as well as under Article 1, Section 29 of the Missouri Constitution by denying to Appellants Thruston and Ward their right to bargain collectively through representatives of their own choosing and their right to freedom of speech, freedom of association and freedom of representation. Appellant Gifford claimed that her rights to represent Appellants Thruston and Ward in a representative capacity were similarly violated, thereby violating her rights under Article 1, Section 29 of the Missouri Constitution and the First and Fourteenth Amendments of the United States Constitution as well. (LF 2-19).

The nature of this case brings this matter within the general appellate review authority of the Missouri Appellate Courts, and having been originally and properly filed in Cole County, Missouri, jurisdiction and venue properly lie with the Missouri Court of Appeals, Western District, in accordance with the Missouri Constitution, Article 5, Section 3. The general appellate review of the Appellate Courts is the controlling factor in this case since the case does not involve an issue of the Avalidity@ of the AConstitution of this State@; rather, it involves the interpretation of Article 1, Section 29, Missouri Constitution.

## STATEMENT OF FACTS

This case involves an appeal of Findings of Fact, Conclusions of Law, Judgment, Decree and Order issued by the Honorable Thomas J. Brown, III, Cole County Circuit Court on June 18, 2001. The order sustained Defendant Jefferson City School District=s Motion to Dismiss. As such, the standard of review is that for a Motion to Dismiss. (LF 60-65).

A review of the Petition upon which this case is based notes that the Appellants, Cheryl Thruston, Fern Ward, and Luana Gifford, all challenged actions and conduct of the Respondent, Jefferson City School District. (LF 2-19). The respective cases of the Appellants may be described briefly and succinctly.

### Cheryl Thruston=s Claim:

Appellant Thruston claimed that she was an employee of the Respondent Jefferson City School District (hereinafter ASchool District@), under contract with the School District, to perform services as a school teacher for the 1999-2000 school year. (LF 2). Appellant Thruston was assigned to a class of behavior-disordered children in the School District at Southwest Elementary School. She experienced numerous problems with students in the classroom, and raised these issues with the Administration. (LF 2-3).

When nothing occurred to resolve the outstanding issues concerning working conditions, Appellant Thruston, a dues-paying member of the Missouri Federation of Teachers and School-Related Personnel, AFT-AFL-CIO, (hereinafter AMissouri Federation of Teachers@), went with Appellant Gifford, the President of the Missouri Federation of Teachers, to the School District Administrative offices to meet with an assistant superintendent in order

to alert the District of the working condition problems in her classroom. (LF 3). The problems which Thruston related included the following:

a. In a class of ten (10) students, Thruston, at the time of her meeting, had only four (4) math books for her grade level and no new books. District-wide, new math books had been distributed for the 1999-2000 school year.

b. Appellant Thruston requested one (1) computer in her classroom, a converted house trailer, which was not provided at the time of the October 1999 meeting.

c. Appellant Thruston requested special training for teachers and aides involved with behavior-disordered children. The aide which had been assigned at the outset of the school year had resigned unexpectedly on or about October 1, 1999, and a new aide had been hired with no such training. (LF 3-4).

At the time of her meeting with Assistant Superintendent Sharp, Appellant Thruston had been made aware of no so-called problems with her job performance with the District. (LF 3-4).

In November of 1999, Dr. Gregory P. Markway, a licensed psychologist with St. Mary's Mental Health Services, Jefferson City, Missouri, observed the behavior-disordered student classrooms on behalf of Respondent School District. His conclusions included that the classrooms needed additional staffing to help maintain behavior control and to allow the students to learn, that individualized time with School District staff members should be provided to each student each day, that the School District needed smaller classes for behavior-disordered children, that the house-trailer classroom environment was not appropriate for such

children, and that a social worker should be assigned specifically to such students. Dr. Markway concluded that the problem was not with the teachers involved, but rather with the lack of staffing and support from Respondent School District. (LF 4).

Following Appellant Thruston=s meeting with Respondent School District personnel and her Union representative, Appellant Gifford, Thruston=s building principal became antagonistic and confrontational with her. In this regard, on or about November 4, 1999, the building principal met with Thruston and insisted that there be cut-backs on recess time for her students, no free time in classrooms, and that Thruston was to watch training movies after school. During this meeting, the principal asked Thruston if she wanted to resign, to which she replied in the negative. At no prior time had Thruston ever raised the issue of resigning. (LF3-4).

On or about November 8, 1999, Thruston reported a physical attack by a student to the building principal. She was informed by the principal not to discuss the behavior-disordered classroom with anyone outside of the school. This absolute prohibition included, of course, Appellant Gifford, her Union representative. The building principal again asked Thruston if she wanted to resign, and again she responded in the negative.

On or about November 11, 1999, the building principal instructed Thruston to speak positively to students, even when their behavior was disrupting the classroom. On or about November 18, 1999, the building principal informed Thruston that her students were to eat breakfast and lunch in the converted trailer which was their classroom, and that a teacher=s aide was to bring food and utensils to and from the classroom, the students thereby being denied the opportunity to eat in the cafeteria with other students. On the same date, a student punched a

teacher=s aide in the back in the behavior-disordered classroom. Over the objections of Cheryl Thruston, the building principal insisted that an in-school suspension be imposed in a Apadded closet@ room. (LF 4-5).

On or about November 19, 1999, the student who punched the teacher=s aide in the back did so again. On or about November 22, 1999, the principal again directed Thruston to speak positively to students even when they were disruptive. On or about November 23, 1999, less than a month after her first meeting with the School District personnel and her Union representative, Thruston was given job targets implying her performance was unsatisfactory, and was informed by the principal that her job was in jeopardy. In December of 1999, Thruston filed a Grievance concerning her job targets, the lack of support she was receiving from Respondent School District, the chilling effect which the orders not to discuss general classroom problems with anyone else had on her free speech, and the perception that her job was jeopardized due to her Union activity. (LF 5, 14-17).

Respondent School District Assistant Superintendent=s response to Thruston=s Grievance made no specific reference to Thruston=s affiliation with the Missouri Federation of Teachers or her specific choice of a representative, but did state that Respondent School District Aencourages all teachers to join a professional organization@ and stated with respect to her performance based teacher evaluation that this was a Anon-grievable area.@ (LF 5, 18-19).

Cheryl Thruston=s Grievance specifically referred to abridgement of her First Amendment Rights when she was told not to discuss her working conditions with anyone and

the abridgment of Freedom of Association and Representation Rights, which occurred after the October 25 and October 26, 1999 meetings. Respondent School District=s initial response dated December 2, 1999, to the Grievance did not refer at all to these issues. The students in Appellant Thruston=s classroom were subject to U.S. Department of Education and Missouri Department of Elementary and Secondary Education mandated individualized education programs as a result of their behavior-disordered status. These programs require, in part, maximum integration of students with non-behavior-disordered students in the least restrictive environment possible. (LF 5-7; 16-19).

Article 1, Section 29 of the Missouri Constitution states that AEmployees shall have the right to organize and to bargain collectively through representatives of their own choosing.@ The First Amendment to the United States Constitution applicable to Respondent School District through the operation of the Fourteenth Amendment to the U.S. Constitution affords the Appellants freedom of association and speech without unreasonable restriction. Thruston claims in her petition that her rights to organize under Article 1, Section 29 of the Missouri Constitution were unlawfully abridged by virtue of the fact that her job was jeopardized and she received job targets and low performance-based teacher evaluations only after her affiliation and activity with the Missouri Federation of Teachers was made specifically known to School District officials by virtue of her grievance meetings in late October of 1999. These meetings with School District officials and Luana Gifford, President of the Missouri Federation of Teachers were procedural means for Thruston to assert her collective bargaining rights.

Thruston claims that her rights were further abridged under the Missouri Constitution when she was specifically instructed not to discuss anything about her job duties and the behavior-disordered program with anyone, including Gifford. Thruston claims that her rights were further abridged and chilled when School District officials repeatedly inquired as to whether she wanted to resign her job following her meeting with School District officials and Gifford in late October, 1999. Cheryl Thruston then prayed for a declaratory order against the School District declaring her rights to bargain collectively and organize through a representative of her own choosing under Article 1, Section 29 of the Missouri Constitution and declaring her rights to Freedom of Association and Freedom of Representation under the First and Fourteenth Amendments of the U.S. Constitution. Thruston further asked that Respondent School District be specifically directed to cease and desist from said abridgment of her rights. (LF 6-8).

**Fern Ward=s Claim:**

Fern Ward, for her cause of action, claims that she was an employee of Respondent School District as a principal in the District for the 1999-2000 school year. She was informed in February 2000 that her contract would not be renewed in spite of the fact that she had been a principal in Respondent District for many years. Appellant Ward contends that her duties as a principal were severely limited for the remainder of the school year in March of 2000. She attempted to file a Grievance under School District policies, but was denied her opportunity

to do so. The Grievance was directed to the abridgment of her duties rather than to the non-renewal of her contract. (LF 9).

Fern Ward furthermore attempted to select a representative of her own choosing, Luana Gifford, to attempt to resolve all outstanding issues with the School District, but was denied the opportunity to do so. (LF 9). Again, under Article 1, Section 29 of the Missouri Constitution, Ward contends in her petition that her rights as an employee to organize and bargain collectively through a representative of her own choosing were thereby limited and she was denied the opportunity to meet with School District officials with a representative of her own choosing through the only process left open to her **B** the Grievance process. (LF 10).

Fern Ward further claims that her rights of Freedom of Association and Freedom of Speech under the First and Fourteenth Amendments to the U.S. Constitution were similarly infringed through the denial by School District of her opportunity to pursue a Grievance concerning a change of work duties. After attempting to file a Grievance and utilize a representative of her own choosing, Appellant Ward was stripped of additional duties, deprived of her opportunity to perform said additional duties, and was transferred outside of her school. Respondent School District=s actions as so described, further deprived Appellant Ward of her rights to organize and bargain collectively under the Missouri Constitution through a representative of her own choosing. This conduct of depriving Appellant Ward of her rights under the First and Fourteenth Amendments of the U.S. Constitution, as well as Article 1, Section 29 of the Missouri Constitution entitles Appellant Ward, to declaratory relief declaring that the School District was in violation of her rights, and that the School District be

specifically directed to cease and desist from said abridgment of Appellant Ward=s rights under Article 1, Section 29 of the Missouri Constitution and the First and Fourteenth Amendments of the U.S. Constitution. (LF 10-11).

**Luana Gifford=s Claim:**

Luana Gifford, the President of the Missouri Federation of Teachers and School-Related Personnel, AFL-CIO, claims in her demand for relief in Count III of the Petition from which this Appeal was taken, the dismissal of which resulted in her Appeal, that her rights under the First and Fourteenth Amendments of the U.S. Constitution were abridged in that with respect to Appellants Thruston and Ward, her opportunity to represent them and speak on their behalf was effectively chilled as a result of the conduct of the School District against both Appellants Thruston and Ward. The job threatening conduct undertaken by School District officials against Thruston and the District=s refusal to hear Ward=s Grievance and its further limiting of her duties as a result of her Grievance, had a severe chilling impact on the exercise of rights by Appellants. As a result of this conduct, Gifford prayed for an order of the Court declaring that Respondent School District abridged her rights under the First and Fourteenth Amendments of the U.S. Constitution by denying her right to associate with, speak on behalf of and represent Appellants Thruston and Ward in Grievance proceedings, and for an order directing Respondent School District to cease and desist from such conduct in the future. (LF 10-11).

**Other Facts:**

Subsequent to the filing of this petition and the Motion to Dismiss filed by the School District, Fern Ward voluntarily dismissed without prejudice from her petition Aclaims referencing defamation, loss of reputation and damages resulting@ from the conduct of Respondent School District. (LF 33). After extensive briefing and oral argument, Judge Brown, on June 18, 2001, issued his Findings of Fact, Conclusions of Law, Judgment, Decree and Order granting Respondent School District=s Motion to Dismiss in all respects. It is from this Order which Appellants appeal.

## POINT RELIED ON

**I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT SCHOOL DISTRICT=S MOTION TO DISMISS APPELLANTS= PETITION, BECAUSE WHEN THE AVERMENTS OF THE PETITION ARE TAKEN AS TRUE, APPELLANTS= CAUSES OF ACTION STATE CLAIMS AGAINST THE SCHOOL DISTRICT UNDER ARTICLE 1, SECTION 29 OF THE MISSOURI CONSTITUTION FOR DENIAL OF COLLECTIVE BARGAINING OR REPRESENTATIONAL RIGHTS OF EMPLOYEES, AND SAID CAUSES OF ACTION FURTHERMORE STATE CLAIMS FOR DENIAL AND ABRIDGMENT OF FREEDOM OF SPEECH, ASSOCIATION AND REPRESENTATIONAL RIGHTS, UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION FOR WHICH RELIEF MUST BE GRANTED IN THAT:**

**(A) ACTIONS TAKEN AGAINST APPELLANT THRUSTON BY RESPONDENT SCHOOL DISTRICT IN HAVING DISTRICT REPRESENTATIVES RECOMMEND THAT SHE RESIGN, IN IMPOSING THREATENING JOB TARGETS AS THOUGH SHE WAS PERFORMING IN A SUBSTANDARD MANNER UNDER HER TEACHER CONTRACT, AND IN ADVISING HER NOT TO DISCUSS ANYTHING, INCLUDING HER TERMS AND CONDITIONS OF EMPLOYMENT WITH ANYONE OUTSIDE OF THE DISTRICT, INCLUDING APPELLANT GIFFORD, AND OTHER RELATED CONDUCT EFFECTIVELY DENIED AND ABRIDGED ALL SAID RIGHTS; AND**

**(B) ACTIONS TAKEN AGAINST APPELLANT WARD IN REFUSING TO HEAR HER GRIEVANCE CONCERNING CHANGE OF JOB DUTIES IN BREACH OF HER STANDARD CONTRACT AS A PRINCIPAL FOR THE 1999-2000 SCHOOL YEAR, AND IN REFUSING TO PERMIT HER TO HAVE A REPRESENTATIVE OF HER OWN CHOOSING IN SUCH PROCESS OR TO EVEN HAVE A GRIEVANCE HEARING, AND IN FURTHER LIMITING HER DUTIES FOLLOWING HER ATTEMPT TO FILE A GRIEVANCE DENIED AND ABRIDGED ALL SAID RIGHTS; AND**

**(C) ACTIONS TAKEN TO LIMIT THE OPPORTUNITY OF APPELLANT GIFFORD TO EFFECTIVELY REPRESENT EITHER APPELLANT THRUSTON OR APPELLANT WARD IN GRIEVANCE PROCEEDINGS BEFORE THE DISTRICT EFFECTIVELY DENIED HER RIGHTS OF FREEDOM OF SPEECH AND ASSOCIATION UNDER THE**

**FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND OF HER RIGHT TO ACT IN A REPRESENTATIVE CAPACITY UNDER ARTICLE 1, SECTION 29 OF THE MISSOURI CONSTITUTION.**

**CASES:**

Eastwood v. North Central Missouri Drug Task Force, 15 S.W.3d 65 (Mo. App. W.D. 2000)

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. en banc, 1947)

Vorbeck v. McNeal, 407 F.Supp. 733 (E.D. Mo., 1976)

State ex rel. Baumruk v. Belt, 964 S.W.2d 443 (1998)

**STATUTES:**

Chapter 105.500, R.S.MO.

**OTHER REFERENCES:**

First and Fourteenth Amendments of the United States Constitution

Article 1, Section 29 of the Missouri Constitution

Article 5, Section 3 of the Missouri Constitution

Article 1, Section 17 of the New York Constitution

Article 1, Section 6 of the Florida Constitution

Executive Order Number 10988, executed by President John F. Kennedy (1962)

Webster=s New World Dictionary and Thesaurus, 4th Ed. (Merriam-Webster, Inc., Springfield, Mass. 1993)

## ARGUMENT

**I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT SCHOOL DISTRICT=S MOTION TO DISMISS APPELLANTS= PETITION, BECAUSE WHEN THE AVERMENTS OF THE PETITION ARE TAKEN AS TRUE, APPELLANTS= CAUSES OF ACTION STATE CLAIMS AGAINST THE SCHOOL DISTRICT UNDER ARTICLE 1, SECTION 29 OF THE MISSOURI CONSTITUTION FOR DENIAL OF COLLECTIVE BARGAINING OR REPRESENTATIONAL RIGHTS OF EMPLOYEES, AND SAID CAUSES OF ACTION FURTHERMORE STATE CLAIMS FOR DENIAL AND ABRIDGMENT OF FREEDOM OF SPEECH, ASSOCIATION AND REPRESENTATIONAL RIGHTS, UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION FOR WHICH RELIEF MUST BE GRANTED IN THAT:**

**(A) ACTIONS TAKEN AGAINST APPELLANT THRUSTON BY RESPONDENT SCHOOL DISTRICT IN HAVING DISTRICT REPRESENTATIVES RECOMMEND THAT SHE RESIGN, IN IMPOSING THREATENING JOB TARGETS AS THOUGH SHE WAS PERFORMING IN A SUBSTANDARD MANNER UNDER HER TEACHER CONTRACT, AND IN ADVISING HER NOT TO DISCUSS ANYTHING, INCLUDING HER TERMS AND CONDITIONS OF EMPLOYMENT WITH ANYONE OUTSIDE OF THE DISTRICT, INCLUDING APPELLANT GIFFORD, AND OTHER RELATED CONDUCT EFFECTIVELY DENIED AND ABRIDGED ALL SAID RIGHTS; AND**

**(B) ACTIONS TAKEN AGAINST APPELLANT WARD IN REFUSING TO HEAR HER GRIEVANCE CONCERNING CHANGE OF JOB DUTIES IN BREACH OF HER STANDARD CONTRACT AS A PRINCIPAL FOR THE 1999-2000 SCHOOL YEAR, AND IN REFUSING TO PERMIT HER TO HAVE A REPRESENTATIVE OF HER OWN CHOOSING IN SUCH PROCESS OR TO EVEN HAVE A GRIEVANCE HEARING, AND IN FURTHER LIMITING HER DUTIES FOLLOWING HER ATTEMPT TO FILE A GRIEVANCE DENIED AND ABRIDGED ALL SAID RIGHTS; AND**

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**FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND OF HER RIGHT TO ACT IN A REPRESENTATIVE CAPACITY UNDER ARTICLE 1, SECTION 29 OF THE MISSOURI CONSTITUTION.**

**Standard of Review:** In reviewing a Motion to Dismiss, the standard of review which applies Ais solely a test of the adequacy of the Plaintiff=s Petition. It assumes that all of Plaintiff=s averments are true, and liberally grants to Plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead the Petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause of action that might be adopted in that case.@ Eastwood v. North Central Missouri Drug Task Force, 15 S.W.3d 65 (Mo. App. W.D. 2000); see also Shouse v. R.F.B. Construction Co., Inc., 10 S.W.3d 189 (Mo. App. W.D. 1999); Magee v. Blue Ridge Professional Building, 821 S.W.2d 839 (Mo. en banc, 1991). Unlike a review of a summary judgment, the Appellate Court, when reviewing the granting of a Motion to Dismiss, looks only to the Petition itself, with Aall facts alleged in the Petition@ Ataken as true and the Plaintiff is given the benefit of every reasonable intendment.@ 821 S.W.2d at 842. This standard of review applies to the argument and each sub-argument made herein.

**A. A review of the Motion to Dismiss the Claims of Cheryl Thruston and Fern Ward:** The claims of Appellants Thruston and Ward are similar in that they are both Aemployees@ of Respondent Jefferson City School District. As such, from the plain meaning of Article 1, Section 29, Missouri Constitution, but for interpretations of extant case law, they

would have constitutional protections to Abargain collectively through representatives of their own choosing.@ Article 1, Section 29, Missouri Constitution. The Missouri Courts have Aa duty to ascertain the intent@ of legislative or constitutional drafters Afrom the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning.@ State ex rel. Baumruk v. Belt, 964 S.W.2d 443, 445 (1998). In this regard, the term Acollective bargaining@ relates to the constitutional reference Ato bargain collectively@ which means a Anegotiation between an employer and a labor union usually on wages, hours and working conditions . . .@ Webster=s New World Dictionary and Thesaurus, 4th Ed. (Merriam-Webster, Inc., Springfield, Mass. 1993). The word Aemployee@ is defined as Aone hired by another for wages or salary.@ Webster=s New World Dictionary and Thesaurus, 4th Ed. (Merriam-Webster, Inc., Springfield, Mass. 1993).

Both Appellants Thruston and Ward were employees. Both sought to bargain collectively with their employer over terms and conditions of employment in that both filed grievances concerning their working conditions. With respect to Thruston, she was concerned that Respondent School District was not providing to her all of the resources necessary to properly instruct and educate her learning-disabled children. With respect to Ward, she was concerned that her contract to teach as a principal was abrogated and altered and that she was not allowed to grieve these changes in her job duties B terms and conditions of employment. Furthermore, neither Thruston nor Ward were effectively entitled to utilize Luana Gifford to pursue their interests. After Thruston appeared at a grievance proceeding with Gifford, Thruston became the subject of job targets and was almost immediately asked whether she

would like to resign by her building principal B issues that had never arisen prior to her filing and pursuit of a grievance concerning terms and conditions of employment. With respect to Ward, she was never entitled to pursue her grievance to the District at all, and after filing the Grievance, her duties were further limited.

The obvious issue then becomes the applicability of Article 1, Section 29 of the Missouri Constitution to Appellants Thruston and Ward and vicariously to Appellant Gifford who was denied the opportunity to represent Appellants Thruston and Ward in the collective bargaining process. Gifford at the time was the President of the Missouri Federation of Teachers, a labor organization to which both Thruston and Ward belonged. Article 1, Section 29, Missouri Constitution is very clear in its statement of rights. This provision states with Article Preamble included:

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare ...:
>
> Section 29. That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

There is no limit contained therein to private employees. Nevertheless, such a limit, without limiting the scope of the right of the collective bargaining and representational right, but rather by limiting the scope of the Article itself, was declared in City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. en banc, 1947) over fifty (50) years ago. In that case, in spite of the clear constitutional language, the Missouri Supreme Court held AWe must rule that Section 29 does not apply to any public officers or employees.@ It is this conclusion which is

being challenged today. 206 S.W.2d at 542. As the Missouri Supreme Court concluded in Baumruk and in State v. Barnes, 942 S.W.2d 362 (Mo. en banc, 1997), ordinary dictionary definitions may be cited in order to discern the true meaning of statutory or constitutional provisions.

The Court in Clouse, seemed primarily worried about the restraining effect of binding collective bargaining agreements on public entities and perhaps as well about an extension of the right to strike to public employees. No such issues exist here. Appellants in this case merely seek the right to grieve and thereby collectively bargain through representatives of their own choosing in accordance with the established grievance procedure of the Jefferson City School District. They furthermore only seek confirmation of the terms and conditions of employment under annual teacher and administrator contracts freely granted by Respondent School District. The Clouse Court, interestingly, did acknowledge that all citizens, including public employees, have the right to organize and to speak freely and present their views to any public officer or legislative body. 206 S.W.2d at 542. The Clouse Court also acknowledged that such organizations are Alikewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions.@ It is only such limited bargaining rights which Appellants seek here and which were denied by Respondent School District. The Clouse Court went on to state that there is nothing wrong with such organization of municipal employees into labor unions Aand that no new constitutional provisions were necessary to authorize them.@ 206 S.W.2d at 542.

However, in this position, the Court is mistaken. To join and organize into a labor union implies that some salutary benefit may be obtained in so-doing. However, in this case, as often occurs, the public entity, in misguided reliance on Clouse, denies its employees the right to effectively be represented by their labor organization once they become a member. It is this chilling effect on the organizational rights of public employees which is being challenged. It is this chilling effect on the exercise of First Amendment rights to assemble, organize and speak freely and on the rights of Article 1, Section 29 of the Missouri Constitution to organize and bargain collectively through chosen representatives that Appellants challenge in this case. While the Clouse Court claimed that Athe process of collective bargaining, as usually understood, cannot be transplanted into the public service@ subsequent developments have provided a changed definition of public employee collective bargaining in the public sector. Unless specifically authorized, no one assumes that public employees have the right to strike. Similarly, public employees do not have the right to bargain over wages or other matters where legislative appropriation not previously obtained is required. These limits on public employee collective bargaining were not generally recognized in 1947, but have been recognized since. Armed with this altered definition of collective bargaining as that term applies to public employees, the plain meaning of Article 1, Section 29, Missouri Constitution must grant to Appellants, public employees, these limited collective bargaining rights.

Interestingly, the Clouse Court quoted President Franklin D. Roosevelt in a letter to the head of a federal employee union as noting that Acollective bargaining, as usually understood, cannot be transplanted into the public service.@ 206 S.W.2d at 1247. Subsequently, in 1962,

President Kennedy in Executive Order Number 10988, AEmployee-Management Cooperation in the Federal Service@ granted to federal employees certain collective bargaining rights. Kennedy=s Executive Order granting to public employees the right to collectively bargain specifically limited them from having the right to strike or engaging in discriminatory practices through their labor organizations. President Kennedy=s Executive Order concisely defines the nature of collective bargaining in a public employee context. While such employees do not have the right to insist on appropriations not acted upon legislatively or to strike, they do have the right through their formally-recognized employee organizations to consult with the organization Ain the formulation and implementation of personnel policies and practices, and matters effecting working conditions that are of concern to its members.@ A grievance procedure was also authorized within the Executive Order for consideration of grievances effecting terms and conditions of employment not otherwise in conflict with law. In short, with certain restrictions necessary for the conduct of governmental services, President Kennedy in 1962 formulated what Franklin Roosevelt indirectly referred to in his letter quoted in Clouse. Kennedy=s Order devised a form of collective bargaining, not as usually understood in the private sector, but as would work in the public sector.

It is Appellants= position that their requests for redress of their grievances concerning working conditions in light of their existing employment contracts is merely the assertion of a limited public employee collective bargaining right under Article 1, Section 29 of the Missouri Constitution and of their rights to freedom of association, speech and assembly under the First and Fourteenth Amendments of the United States Constitution. The modern definition

of collective bargaining in the public sector includes the rights asserted by Appellants and the definitions of Aemployee@ and Arepresentative@, as such terms are used in Article 1, Section 29 of the Missouri Constitution, further apply to the Appellants.

In Vorbeck v. McNeal, 407 F.Supp. 733 (E.D. Mo., 1976), the District Court found that a rule prohibiting Plaintiff=s participation or membership in any association, meeting, union or organization without public employee authorization posed an unconstitutional infringement on the First Amendment freedom of association rights of such members. The conduct of Respondent School District in this case in refusing to even hear the grievance of Ward through her chosen representative, Appellant Gifford and in intimidating and threatening Thruston after she pursued a grievance with Appellant Gifford as her representative constituted an unconstitutional infringement on the First and Fourteenth Amendment rights of all three individuals.

As the Court concluded in Vorbeck, the state=s legitimate interest with respect to certain classifications of public employees in averting a strike must be narrowly protected and not so widely defined that First Amendment rights are impacted. The same analysis applies with respect to Article 1, Section 29 of the Missouri Constitution. The term Acollective bargaining@ can, as President Kennedy showed, be narrowly defined to protect governmental rights while allowing certain representational and free speech rights of Appellants to be exercised. A narrow definition of Acollective bargaining@ is now available in standard dictionaries and should be used to circumscribe the actions of Appellants without unduly limiting their rights to peaceably assemble and organize. The right to join an organization carries with it organizational purposes.

The right to join a labor organization is meaningless if it does not carry with it the right to at least grieve concerning restrictions and changes in working conditions.

No attempt to strike is involved in this case, and no attempt to compel Respondent School District to enter a binding contract which it cannot alter is involved. Interestingly, Respondent School District in this very case entered a settlement with monetary relief for Appellant Thruston. No one denies that this settlement and release itself is enforceable. Nevertheless, Respondent School District contends that it cannot discuss a grievance without, as a direct result thereof, limiting Appellant Thruston=s First Amendment rights. Respondent School District apparently contends that it has no need to even meet and confer to discuss issues with Appellant Ward. This is in spite of the fact that both individuals are Aemployees@ as that term is commonly defined, both individuals chose a Arepresentative@ as that term is commonly defined, and both Appellants merely wanted to negotiate and discuss changes in their working conditions which involved bargaining collectively through representatives of their own choosing.

**B. <u>Appellant Gifford=s Representational Effort Denial is also a Limitation on Her Free Exercise of Rights Under Both the Missouri and United States Constitutions.</u>**

Just as the rights of freedom of speech, association and representation under the First and Fourteenth Amendments of the United States Constitution were infringed upon by Respondent School District in denying Appellants Thruston and Ward their right to bargain collectively through utilization of Appellant Gifford in a representational capacity, so by corollary were Appellant Gifford=s rights adversely affected as well. Article 1, Section 29,

Missouri Constitution affords to all employees the right to bargain collectively through representatives of their own choosing. Employees Thruston and Ward attempted to utilize the services of Appellant Gifford. The denial of their right to do so not only impacted them, it also impacted Appellant Gifford and her organization, the Missouri Federation of Teachers. The same Clouse analysis under Article 1, Section 29 which unduly restricted the rights of Appellants Thruston and Ward similarly restricted the right of Appellant Gifford.

The Court in Vorbeck, noted that a rule prohibiting an individual=s participation or membership in any association, union or organization posed an unconstitutional infringement on that person=s First Amendment freedom of association, speech and representation rights. As President of such an association, the limitation placed on Gifford=s rights to represent Thruston and Ward similarly infringed upon Gifford=s rights under the First and Fourteenth Amendments of the United States Constitution. Utilizing the term Arepresentative@ as that term is commonly defined, and which analysis is required by State v. Barnes, supra, Appellant Gifford was merely attempting to be a representative of Appellants Thruston and Ward and was denied her right to be so.

**C. Case Law in Other Jurisdictions Supports a Reconsideration of Missouri Case Law:** Under the New York Constitution, Article 1, Section 17, adopted in 1938, with respect to collective bargaining, is almost identical to the Missouri Constitutional provision in that it states Aemployees shall have the right to organize and to bargain collectively through representatives of their own choosing.@ This provision, adopted seven (7) years before the Missouri provision was presumably the provision upon which the Missouri provision, was

patterned. As the New York Supreme Court clearly held in Cliff v. Blydenburg, 173 Misc.2d 366 (1997), the refusal of a political subdivision to bargain collectively over issues covered arguably by another ordinance over which there was no collective bargaining constitutes a violation of Article 1, Section 17 of the New York Constitution. See also, Doyle v. City of Troy, 380 N.Y.S.2d 789 (N.Y. A.D., 1976).

The Florida Constitution similarly grants the rights of employees to bargain collectively and then specifically states that Apublic employees shall not have the right to strike.@ Article 1, Section 6 Florida Constitution. The case at bar does not involve a right to strike issue. It merely involves the question of what bargaining collectively means in a public employment context. While public employees do not have the right to strike in Florida and while no such right is being asserted here, Florida courts have noted that the definition of collective bargaining rights is beneficial to the public entity, as well, in that Athe rights exist not only for the benefit of the employees but also to encourage labor peace.@ City of Miami v. Fraternal Order of Police, Miami Lodge 20, 571 So.2d 1309 (Florida, 1991); United Teachers of Dade County School Board, 500 So.2d 508 (Florida, 1986). Interestingly, the provision of the Florida Constitution which grants limited collective bargaining rights in the view of Florida courts to public employees is its Aright to work@ provision. Missouri, thankfully, is not a right-to-work state. The very similar language, however, in the Missouri Constitution cannot be viewed to preclude any and all collective bargaining rights of public employees. Rather, as in Florida, a hybrid collective bargaining right has been crafted under the Missouri Constitution and it should now be so recognized.

In Missouri, as in Florida, the right to bargain collectively is provided to public employees under the state constitution. Any abridgement of that right must be justified by a compelling state interest. City of Tallahassee v. Public Employee Relations Commission, 410 So.2d 487 (Florida, 1981). Exclusion of the right to strike from public employee rights is justified because of the public service involved. Certain restrictions on bargaining over wages as an intrusion on legislative authority to appropriate are also justified. Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. 1983). The Appellants in this case are not negotiating over wages or hours of employment; they already have signed contracts. They are not asserting coverage by the meet and confer law of Chapter 105.500 R.S.Mo., et seq., which does not cover teachers. Appellants here are merely negotiating or attempting to negotiate and grieve over mid-term changes in their contractual terms and conditions of employment. There is no compelling state interest to preclude this negotiation and, in fact, to the extent that labor peace is thereby encouraged, there is a compelling state interest to permit such grievance processing meaningfully and fully. As the Florida court concluded in Chiles v. State Employees Attorney Guild, 714 So.2d 502 (1998), any limitation of employees= rights to bargain collectively based on a compelling state interest should be by the minimally necessary means. Such minimal means were not used here and are not appropriately defined in Clouse. Under such circumstances, the circuit court=s dismissal of Appellants= Petition must be reversed.

## CONCLUSION

It is respectfully submitted that this Court must overrule or clarify City of Springfield v. Clouse, in view of the clear meaning of Article 1, Section 29 of the Missouri Constitution and the evolving definition of public employee collective bargaining as that term has been refined since the 1947 Clouse decision. As modified by Vorbeck, Appellants certainly have a First and Fourteenth Amendment right to associate, join organizations, assemble and speak in a free and meaningful way about their concerns. That right, to be more than an empty vessel, must carry with it certain rights to proceed organizationally and to collectively pursue their interests. It is respectfully submitted that the Court must so rule and reverse and remand the Circuit Court decision to accomplish these purposes.

# APPENDIX

## CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing ABrief of Appellant@ were mailed postage prepaid to: Tom Mickes, Melanie Gurley Keeney, and John M. Reynolds, 225 South Woods Mill Road, Suite 300, Chesterfield, Missouri 63017, and Johnny Richardson, 312 East Capitol Avenue, Jefferson City, Missouri 65101, Counsel and Co-counsel for Defendant/Respondent Jefferson City School District, this _____ day of _____, 2001.

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bcc: Daniel J. ADuke@ McVey
Fern Ward
Luana Gifford
Hugh McVey
Cheryl Thruston